

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 1ST OCTOBER 2007 / 9TH ASWINA 1929

RSA.No. 738 of 2003()

AS.148/2001 of V ADDL. DISTRICT COURT, ERNAKULAM
OS.120/1998 of ADDL.SUB COURT, KOCHI
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APPELLANT/APPELLANT/DEFENDANT:

P.K.HYDROS, S/O. KOCHUNNY,
MUSLIM, AGED 70 YEARS, PULIKANATTU HOUSE,
C.C.NO.13/1027, WEST OF MAHARAJA'S HOSPITAL,
PALLURUTHY AT KARUVELIPPADY, COCHIN TALUK.

BY ADV. SRI.T.K.KURIKESU

RESPONDENT/RESPONDENT/PLAINTIFF:

K.J.AUGUSTINE, S/O. JOSEPH,
CHRISTIAN, AGED 62, KOIKKARAMPARAMBIL HOUSE,
C.C.C.15/1025, KARUVELIPPADY, THOPPUMPADY, KOCHI.

BY //

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION
ON 01/10/2007, ALONG WITH RSA NO.739 OF 2003 THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

R.S.A .NO. 738 OF 2003
&
R.S.A.NO. 739 OF 2003

Dated 1st October 2007

J U D G M E N T

Defendant in O.S.34 of 1997 and O.S.120 of 1998 on the file of Sub court, Kochi is the appellant. Plaintiff is the respondent. O.S.34 of 1997 was filed seeking a decree for recovery of possession with mesne profits. O.S.120 of 1998 was filed seeking a decree for permanent prohibitory injunction restraining appellant from committing any damages to the plaint schedule building. Case of respondent was that plaint schedule property originally belonged to Varghese under Ext.A6 sale certificate issued in court auction sale and under Ext.A3 assignment deed Varghese sold the property in favour of father of respondent and respondent has title to the plaint schedule property under Ext.A3. It was contended that land extending to 37 cents with the building, originally belonged to the family of the appellant as per sale deed No.285/1122 M.E. out

of that property 15½ cents was divided orally and given to brother of father of respondent. Even after court auction sale in O.S.193/1121 M.E, Judgment debtor Ammini Amma continued to reside in the plaint schedule property with the permission of respondent and his predecessor in interest. Ammini Amma instituted O.S.193 of 1121 M.E. before Munsiff court, Kochi. It was dismissed. The appeal filed was also dismissed with cost. For realisation of cost, plaint schedule property and building was sold. It was purchased by Varghese. Varghese had taken delivery of the property on 10/4/1962. Thereafter Ammini Amma filed O.S.23 of 1973 before Munsiff court seeking a decree for injunction against respondent and his father and others contending that Varghese did not obtain possession of the property. Under Ext.A5 judgment that suit was dismissed holding that Ammini Amma is not in possession of the property. Though appeal was filed it was also dismissed. It was alleged that appellant meanwhile trespassed into plaint schedule property and started residing therein on 14/2/1988 as a trespassor and in spite of demand for vacating the building, he did not do so and being a trespassor he is liable to be evicted and is also liable

to pay mesne profit at the rate of Rs.10/- per month. Appellant in the written statement contended that property originally belonged to Amminikutty Amma and her sister Devaki and they were residing there for the last 70 years and after the death of Ammini Amma, her rights devolved on her children Chandrasekhara Pillai and others and they are in possession of the property and they have title to the property and though there was a ciyrt auction sale in O.S.193/1121 M.E, there was no delivery of the property and it was only a paper delivery and therefore Varghese did not get any valid title to the property and being an assignee under Varghese, respondent did not get right over the property and appellant is not a trespassor and so respondent is not entitled to decree sought for in O.S.34 of 1997. Respondent in O.S.120 of 1998 contended that appellant is in possession of the property and O.S.34 of 1997 was filed seeking recovery of possession and meanwhile appellant attempted to demolish the building and he has no right to do so and therefore respondent is to be granted a decree restraining appellant from committing damages to the building. Appellant in his written statement reiterated the contentions raised in O.S.34 of 1997 and also

contended that suit is barred under Order II Rule 2 of Code of Civil Procedure.

2. Learned Munsiff tried both the suits jointly. On the evidence of PW1, Dws.1 to 3, Exts.A1 to A7, B1 to B6, C1 and C2 and X1 it was found that Varghese obtained delivery of possession of the property under Ext.A2 delivery receipt and under Ext.A1 sale certificate Varghese has title to the property. Case of appellant that Varghese did not get delivery of the property was rejected in the light of findings in Ext.A5 judgment in O.S.23 of 1973, where it was found that Varghese had taken delivery of the property. A decree for recovery of possession was granted in O.S.34 of 1997 and appellant was directed to pay mesne profit at the rate of Rs.10/- per month. O.S.120 of 1998 was also decreed restraining appellant from committing any damages to plaint schedule property. Appellant challenged the judgment and decree before District court, Ernakulam in A.S.148 of 2001 and 195 of 2001. Both the appeals were heard together and were dismissed by learned Additional District Judge. Judgments are challenged in these second appeals. R.S.A.738 of 2003 was filed challenging the concurrent decree in O.S.120 of 1998 and R.S.A.739 of 2003 was filed

against the concurrent decree in O.S.34 of 1997.

3. Learned counsel appearing for appellant was heard. Argument of learned counsel is that there is no evidence to prove that Varghese had taken delivery of the property covered under Ext.A1 sale certificate and Ext.A2 delivery receipt is only a paper delivery and therefore courts below should have found that Varghese did not obtain possession of the property and under Ext.A3 father of respondent also did not obtain possession and as delivery was not taken within the period provided under the Limitation Act courts should have found that appellant has no title under Ext.A1. It was therefore argued that suit should have been dismissed by the courts below. Learned counsel also argued that as relief sought for in O.S.120 of 1998 was available to plaintiff at the time when O.S.34 of 1997 was filed, it is barred by the provisions of Order II of Rule 2 of Code of Civil Procedure and that suit should have been dismissed on that ground.

4. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal. O.S.34 of 1997 was filed seeking a decree for recovery of possession on the plea that under Ext.A3 assignment deed

executed by Varghese in favour of father of respondent, respondent has title to plaint schedule property and under Ext.A1 Varghese has title to the property and is title to recover possession of the property. O.S.120 of 1998 was filed subsequently. The only prayer sought for was to restrain appellant from committing any damages to the building. It is effective only till the decree for recovery of possession in O.S.34 of 1997 is executed. Plea that was raised in O.S.120 1998 was not available to the respondent at the time when O.S.34 of 1997 was filed and cause of action is also not the same. In such circumstances, it cannot be stated that O.S.120 of 1998 was barred under Rule 2 of Order II of Code of Civil Procedure as canvased by learned counsel.

5. Crux of the argument of learned counsel is that Varghese did not obtain possession of the property under Ext.A2 delivery receipt. Courts below relying on the findings in the earlier suits (in Exts.A5 and A7 judgments) found that case of appellants that Ext.A2 is only a paper delivery is not correct as it was found that property was taken delivery by Varghese. Argument of learned counsel is that as legal heirs of Ammini Amma were not impleaded in the suit, finding in Ext.A5

judgment should not have been looked into and as there is no other evidence to prove that delivery was taken, it should have been found that respondent has no title.

6. As rightly found by the courts below O.S.23 of 1973 was filed by Ammini Amma. It was for realisation of the cost in O.S.193 of 1121 M.E instituted by Ammini Amma. Plaintiff schedule property was sold in court auction sale and purchased by Varghese. Ext.A1 sale certificate was issued to him. Ext.A2 is the delivery receipt. What was contended in O.S.23 of 1973 by Ammini Amma was that Varghese did not obtain delivery of the property pursuant to Ext.A1 sale certificate and therefore Varghese is not in possession of the property. Under Ext.A5 judgment it was found that delivery was taken by Varghese and Ammini Amma was not in possession of the property. In the light of Ext.A5 judgment, it is not open to the appellant to claim that he obtained possession from Ammini Amma and Ext.A2 was only a symbolic delivery or that actual possession was not taken by Varghese. If property was taken delivery of under Ext.A2, appellant cannot resist the claim for recovery of possession as title necessarily would vest with Varghese and thereafter under Ext.A3 on the father of respondent. In the light

of Ext.A5 judgment appellant cannot contend that Varghese did not obtain possession of the property or Ammini Amma continued the possession. In such circumstances, courts below granted the decree. As no substantial question of law is involved both appeals are dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.738 & 739 OF 2003

1st October 2007

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